

**United States Department of Labor
Employees' Compensation Appeals Board**

C.H., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Marlboro, NJ, Employer**

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**Docket No. 09-883
Issued: December 23, 2009**

Appearances:

Thomas R. Uliase, Esq., for the appellant

Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge

DAVID S. GERSON, Judge

JAMES A. HAYNES, Alternate Judge

JURISDICTION

On February 18, 2009 appellant filed a timely appeal from a November 4, 2008 decision of the Office of Workers' Compensation Programs denying a period of disability. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.

ISSUE

The issue is whether appellant established that she was disabled for work on and after November 9, 2006 due to an accepted temporary aggravation of degenerative spinal disease.

On appeal, appellant, through her attorney, asserts that the Office did not properly utilize the Physicians Directory System (PDS) in selecting Dr. Robert Dennis, a Board-certified orthopedic surgeon and impartial medical examiner. She contends that PDS selection entries of record indicate that the Office reviewed several physicians from the same practice, indicating that the selection process was not on a strictly rotational basis. Alternatively, appellant asserts that Dr. Dennis' opinion as impartial medical examiner cannot represent the weight of the medical evidence as it was speculative and insufficiently rationalized.

Appellant's attorney also appealed a November 27, 2007 decision denying a request for oral hearing. As this decision was not issued within one year of the filing of the appeal on February 18, 2009, the Board does not have jurisdiction over the denial of oral hearing on the present appeal.¹

FACTUAL HISTORY

On November 13, 2006 appellant, then a 58-year old letter carrier, filed a traumatic injury claim (Form CA-1) alleging that on October 30, 2006 she developed low back pain, lumbar spasms and severe right-sided sciatica after driving a delivery truck without power steering for 30 to 45 minutes. She stopped work on November 1, 2006 and did not return.

In a November 21, 2006 letter, the Office advised appellant of the type of additional evidence needed to establish her claim, including a rationalized report from her attending physician explaining how and why the identified work factors would cause the claimed condition.

Appellant was followed initially by Dr. Elias J. Lehaf, an attending Board-certified internist. In reports from November 6 through December 11, 2006, Dr. Lehaf found one-fifth extensor hallucis longus weakness on the right, a positive right straight leg raising test, a right foot drop, lumbar scoliosis, degenerative disc disease, right trochanteric bursitis and right-sided sciatica. Appellant's symptoms improved with epidural injections administered in November 2006. Dr. Lehaf held her off work through January 2007.²

By decision dated January 5, 2007, the Office denied appellant's claim on the grounds that causal relationship was not established. In an August 7, 2007 letter, appellant requested reconsideration. She submitted additional evidence.

In a January 17, 2007 report, Dr. Lehaf noted continued lumbar pain, diminished reflexes in the right leg and a right foot drop. He diagnosed lumbosacral spondylosis.

In a July 16, 2007 report, Dr. Richard M. Lehman, an attending Board-certified neurosurgeon, provided a history of injury and treatment. On examination, he found weakness in the extensor hallucis longus on the right and degenerative scoliosis from L2 to L4. Dr. Lehman opined that driving the truck on October 30, 2006 further compressed exiting nerve roots through the scoliotic spine, permanently aggravating and accelerating the underlying degenerative conditions. He recommended a multilevel lumbar fusion and decompression.

In an August 23, 2007 letter, the Office referred the medical record to an Office medical adviser for review. In August 24 and September 15, 2007 reports, an Office medical adviser

¹ 20 C.F.R. § 501.3 (2009).

² Dr. Lehaf ordered imaging studies. November 5, 2006 x-rays of the right hip showed mild degenerative changes. November 10, 2006 lumbar x-rays showed multilevel degenerative disc disease, dextroscoliosis and osteoarthritic changes from L5 to S1. A November 21, 2006 magnetic resonance imaging (MRI) scan of the spine showed osteophytic complexes from L1 through S1, foraminal stenosis from L3 to S1 and degenerative disc disease.

opined that Dr. Lehman's opinion supported a temporary aggravation of underlying advanced spinal disease that should have resolved within 7 to 10 days. He opined that the temporary aggravation alone did not necessitate the proposed multilevel spinal fusion.

In an August 28, 2007 letter, an employing establishment supervisor stated that, on October 30, 2006, appellant called in because "her power steering had gone out at some point during delivery."

By decision dated October 3, 2007 and reissued November 27, 2007, the Office vacated the January 5, 2007 decision and accepted a temporary aggravation of advanced spinal disease ending no later than November 9, 2006.

In an October 11, 2007 letter, appellant requested reconsideration, asserting that she remained disabled for work on and after November 9, 2006. She submitted a September 27, 2007 report from Dr. Darren Freeman, an attending osteopath, Board-certified in physiatry and pain management. Dr. Freeman provided a history of injury and treatment reviewed medical reports. He opined that the October 30, 2006 work incident caused a permanent aggravation of preexisting lumbar degenerative disease. Dr. Freeman explained that the lack of power steering strained the lumbar spine, exacerbating or causing scoliosis, multiple herniated discs, spinal stenosis and L4-5 foraminal stenosis leading to the right foot drop. He found her totally disabled from working as a letter carrier due to foot drop.

In an October 12, 2007 letter, appellant requested an oral hearing. The Office denied this request, by letter decision dated November 27, 2007, on the grounds that she had previously requested reconsideration on the same issue. It conducted a limited review and determined that appellant's request could be addressed equally well by submitting new, relevant evidence accompanying a valid request for reconsideration.³

In an April 29, 2008 letter, appellant requested reconsideration. She submitted an April 19, 2008 letter from Dr. Freeman who found appellant disabled for work through October 11, 2007 and continuing due to the October 30, 2006 work incident.

On July 30, 2008 the Office found a conflict of medical opinion between Drs. Freeman and Lehman, for appellant, and an Office medical adviser, for the government, regarding the nature and extent of the accepted aggravation of preexisting spinal conditions. On July 30 and 31, 2008 it used the PDS to select an impartial medical examiner. The Office initially selected Dr. Raymond Decker, a Board-certified orthopedic surgeon with an office in appellant's commuting area. It scheduled an appointment with Dr. Decker for August 9, 2008. Dr. Decker's office cancelled the appointment as the physician specialized only in hand surgery. It then reviewed PDS entries for Dr. Teddy Atik and Dr. George Gabudza, both Board-certified orthopedic surgeons in practice with Dr. Decker. The Office noted that both physicians could

³ In a December 11, 2007 letter, appellant, through her attorney, again requested an oral hearing. She asserted that she was entitled to an oral hearing because her prior request for reconsideration did not address whether she was entitled to compensation benefits on and after November 9, 2006. The Office did not take additional action on appellant's December 11, 2007 letter.

not serve as impartial examiners in the case as they were also hand surgeons.⁴ It then used the PDS to select Dr. Dennis, a Board-certified orthopedic surgeon.

On September 18, 2008 the Office referred appellant, the medical record and a statement of accepted facts to Dr. Dennis for an impartial medical examination. In an October 20, 2008 report, Dr. Dennis reviewed the medical record and statement of accepted facts. He noted that “by December 11, 2006, there was no longer any mention of a foot drop.” On examination, Dr. Dennis observed a “bent-over gait” and lumbar scoliosis. He noted that appellant’s shoes were evenly worn, indicating no right foot drop. Dr. Dennis found normal muscle strength and power throughout the lower extremities, negative straight leg raising tests bilaterally and no evidence of right trochanteric bursitis. He asserted that the October 30, 2006 injury did not alter preexisting lumbar scoliosis as August 12, 2005 and November 6, 2006 x-ray films showed identical degrees of scoliosis. Dr. Dennis opined that a November 21, 2006 lumbar MRI scan showed no nerve root compression at L4-5 or L5-S1 that could cause a right foot drop. He explained that, given the lack of objective findings, it was “unlikely that 45 minutes of driving a small truck, even with the motor over the wheels would” cause structural or neurologic damage to the spine. Dr. Dennis diagnosed “[t]ransient soft tissue aggravation secondary to a lumbar sprain superimposed on unaltered” scoliosis, lumbar spondylosis and resolved trochanteric bursitis. He opined that there were no objective findings to justify the proposed lumbar fusion.

By decision dated November 4, 2008, the Office denied modification. It found that Dr. Dennis’ opinion was sufficient to establish that the October 30, 2006 work incident caused only a temporary aggravation of preexisting spinal conditions.

LEGAL PRECEDENT

An employee seeking compensation under the Federal Employees’ Compensation Act⁵ has the burden of establishing the essential elements of her claim by the weight of the reliable, probative and substantial evidence.⁶

To establish a causal relationship between a claimed period of disability claimed and the accepted employment injury, an employee must submit rationalized medical evidence based on a complete medical and factual background, supporting such a causal relationship.⁷ Causal relationship is a medical issue and the medical evidence required to establish a causal relationship is rationalized medical evidence.⁸ Rationalized medical evidence is evidence which includes a physician’s rationalized medical opinion on the issue of whether there is a causal

⁴ The record contains duplicative PDS screen captures dated August 21, September 5 and 16, 2008 noting that Drs. Atik, Decker and Gabudza were hand surgeons only.

⁵ 5 U.S.C. §§ 8101-8193.

⁶ *Donna L. Miller*, 40 ECAB 492, 494 (1989); *Nathaniel Milton*, 37 ECAB 712, 722 (1986).

⁷ *Manuel Gill*, 52 ECAB 282 (2001).

⁸ *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

relationship between the claimant's diagnosed condition and the implicated employment factors. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.⁹

Section 8123 of the Act provides that, if there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician, who shall make an examination.¹⁰ In situations where there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.¹¹ However, in a situation where the Office secures an opinion from an impartial medical examiner for the purpose of resolving a conflict in the medical evidence and the opinion from such examiner requires clarification or elaboration, the Office has the responsibility to secure a supplemental report from the examiner for the purpose of correcting the defect in the original opinion.¹²

ANALYSIS

The Office accepted that on October 30, 2006 appellant sustained a temporary aggravation of degenerative spinal disease which ceased by November 9, 2006. It based its acceptance on an Office medical adviser's review of the reports of appellant's attending physicians, Dr. Lehaf, a Board-certified internist, and Dr. Lehman, a Board-certified neurosurgeon.

Pursuant to a request for reconsideration, appellant submitted reports from Dr. Freeman, an attending osteopath Board-certified in physiatry and pain management, who opined that appellant sustained a permanent aggravation of underlying spinal conditions and remained disabled for work. The Office then found a conflict between Drs. Freeman and Lehman and the Office medical adviser regarding the nature and duration of the accepted aggravation. To resolve the conflict, the Office selected Dr. Dennis, a Board-certified orthopedic surgeon, as the impartial medical examiner.

In an October 20, 2008 report, Dr. Dennis stated that appellant had no objective findings indicative of lumbar nerve root compression or traumatic structural spinal damage. He therefore opined that any work-related aggravation had ceased. However, Dr. Dennis did not specify a date by which appellant's condition returned to baseline. He was appointed to resolve a conflict

⁹ *Leslie C. Moore*, 52 ECAB 132 (2000).

¹⁰ 5 U.S.C. § 8123; *see Charles S. Hamilton*, 52 ECAB 110 (2000).

¹¹ *Jacqueline Brasch (Ronald Brasch)*, 52 ECAB 252 (2001).

¹² *Nancy Keenan*, 56 ECAB 687 (2005).

of medical evidence regarding the duration of the accepted aggravation. Therefore, Dr. Dennis' opinion requires clarification on this critical issue.¹³

Also, Dr. Dennis stated that a right foot drop first diagnosed by Dr. Leahaf on November 6, 2006 had resolved by December 11, 2006. However, Dr. Leahaf observed the right foot drop on his January 17, 2007 examination, more than a month after December 11, 2006. Dr. Dennis did not explain why Dr. Leahaf's January 17, 2007 report was insufficient to establish the presence of a right foot drop on that date.

The Board finds that, since the Office undertook to obtain an impartial medical specialist's opinion, it is now obligated to obtain a sufficiently reasoned report as to whether appellant was disabled for work on and after November 9, 2006.¹⁴ The Board directs the Office to request a supplemental, clarifying report from Dr. Dennis on this issue. Following this and all other development deemed necessary, the Office shall issue an appropriate decision in the case.

On appeal, appellant, through her attorney, contends that Dr. Dennis' opinion cannot represent the weight of the medical evidence as it was speculative and insufficiently rationalized. As set forth above, the Board finds that Dr. Dennis' opinion requires clarification on the issue of when the accepted aggravation ceased. The case will be remanded to the Office to obtain a supplemental report from Dr. Dennis on this issue.

Appellant also asserts that the Office did not properly utilize the PDS in selecting Dr. Dennis. To ensure the complete independence of the physicians, the Office selects an impartial medical specialists, it developed specific procedures to safeguard against any possible appearance that the selected physician's opinion is biased or prejudiced. Impartial medical specialists are selected from among Board-certified specialists in the appropriate geographical area on a strict rotating basis to negate any appearance that preferential treatment exists between a particular physician and the Office.¹⁵ The Federal (FECA) Procedure Manual provides that the selection of referee physicians (impartial medical specialists) is made through a strict rotational system using appropriate medical directories. The procedure manual provides that the PDS should be used for this purpose wherever possible.¹⁶ The PDS is a set of stand-alone software programs designed to support the scheduling of second opinion and referee examinations.¹⁷ The PDS database of physicians is obtained from the American Board of Medical Specialties Directory of Board-certified Medical Specialists (ABMS), which contains the names of physicians who are Board-certified in certain specialties.

¹³ Nancy Keenan, *id.*

¹⁴ Roger W. Griffith, 51 ECAB 491 (2000).

¹⁵ Federal (FECA) Procedure Manual, Part 3 -- Medical, *Medical Examinations*, Chapter 3.500.4b (May 2003). *See also* Willie M. Miller, 53 ECAB 697 (2002).

¹⁶ Federal (FECA) Procedure Manual, *id.* at Chapter 3.500.4b (May 2003). *See also* Willie M. Miller, *id.*

¹⁷ Federal (FECA) Procedure Manual, *id.* at Chapter 3.500.7 (May 2003).

In this case, the Office provided PDS logs regarding Dr. Dennis' selection as the impartial medical specialist. These logs show that, on July 30 and 31, 2008, the Office disqualified three specialists on the PDS roster as they were not specialists in the germane field or medicine. There is no evidence that the Office did not select Dr. Dennis from the PDS or that it failed to comply with its rotational procedures. Counsel has not provided any probative evidence to demonstrate bias on the part of Dr. Dennis. The Board has held that an impartial medical specialist properly selected under the Office's rotational procedures will be presumed unbiased and the party seeking disqualification bears the substantial burden of proving otherwise. Mere allegations are insufficient to establish bias.¹⁸ Accordingly, appellant has not presented any evidence establishing that Dr. Dennis was improperly selected as the impartial medical examiner or that he was biased. Therefore, the evidence does not establish an error in the selection of Dr. Dennis as an impartial medical examiner.

CONCLUSION

The Board finds that the case is not in posture for a decision. The case will be remanded to the Office for further development consistent with this decision and order.

¹⁸ L.W., 59 ECAB ____ (Docket No. 07-1346, issued April 23, 2008).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated November 4, 2008 is set aside, and the case remanded for further action consistent with this decision and order.

Issued: December 23, 2009
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board